

The Honorable Richard A. Jones

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE**

DEBORAH R. BEATON,)
)
 Plaintiff,)
)
v.)
)
JPMORGAN CHASE BANK, N.A.; and)
NORTHWEST TRUSTEE SERVICES, INC.,)
)
 Defendants.)
)
)
)
)
)

No. 11-00872-RAJ

**DEFENDANT NORTHWEST
TRUSTEE SERVICES, INC.'S REPLY
TO PLAINTIFF'S RESPONSE IN
OPPOSITION TO MOTION TO
DISMISS SECOND AMENDED
COMPLAINT AND JOINDER
THEREIN**

I. INTRODUCTION

Defendant Northwest Trustee Services, Inc. (“NWTS”) submits the following in reply to Plaintiff Deborah Beaton’s Response in Opposition to Motion to Dismiss Second Amended Complaint and Affidavit of Civil Rights Violations Committed (Dkt. 59 and 60) and respectfully requests the Court consider the following in further support of NWTS’ joinder and supplement to Defendant JPMorgan Chase Bank’s Motion to Dismiss Plaintiff’s Second Amended Verified Complaint (“Chase’s Motion”).

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II. STATEMENT OF RELEVANT FACTS

On or about DATE, Plaintiff filed an Opposition. The Opposition was supported by an affidavit of Plaintiff.

III. REPLY ARGUMENT

1. Plaintiff's Affidavit of Civil Rights Violations Committed goes beyond the pleadings and cannot be considered by this Court in conjunction with a motion under F.R.C.P. 12(b)(6).

As a general rule, “a court may not consider any material beyond the pleadings in ruling on a Rule 12(b)(6) motion.” *Lee v. City of Los Angeles*, 250 F.3d 668, 688-89 (9th Cir. 2001).

Fed. R. Civ. P. 12(d) expressly provides that when “matters outside the pleadings are presented to and not excluded by the court, the motion must be treated as one for summary judgment under Rule 56.”

There are, however, two exceptions to the requirement that consideration of extrinsic evidence converts a 12(b)(6) motion to a summary judgment motion. First, a court may consider “material which is properly submitted as part of the complaint” on a motion to dismiss without converting the motion to dismiss into a motion for summary judgment. *United States v. Ritchie*, 342 F.3d 903, 908 (9th Cir. 2003). If the documents are not physically attached to the complaint, they may be considered if the documents’ “authenticity … is not contested” and “the plaintiff’s complaint necessarily relies” on them. *Parrino v. FHP, Inc.*, 146 F.3d 699, 705–06 (9th Cir.1998). Second, under Fed.R.Evid. 201, a court may take judicial notice of “matters of public record.” *Mack v. South Bay Beer Distrib.*, 798 F.2d 1279, 1282 (9th Cir.1986).

Here, Plaintiff's Affidavit of Civil Rights Committed (*sic*) does not fall within any of the exceptions outlined above. In other words, the Affidavit goes beyond the pleadings and should not be considered by this Court in ruling on Defendants' motions under F.R.C.P. 12(b)(6).¹

¹ Even if considered by this Court, Plaintiff's Affidavit contains no allegations as to NWTS and therefore fails to set forth any basis for relief.

1 **2. In light of Plaintiff's failure to respond to NWTS' Request Dismissal of the FDCPA
2 claim, Dismissal is merited.**

3 In this District, "If a party fails to file papers in opposition to a motion, such failure may
4 be considered by the court as an admission that the motion has merit." CR 7(b)(2). The rule also
5 applies when a party files an opposition that neglects to provide any controverting argument in
6 support of his claims. (*See, e.g., Silver v. Citimortgage, Inc.*, - F.Supp.2d-, 2011 WL 5548010, *5
7 (W.D.Wash.) ("[Plaintiffs' opposition briefing] offered absolutely no response to [Defendant's]
8 motion to dismiss their breach-of-contract claim, which the court construes as an admission that
9 the motion has merit. ... Accordingly, the court dismisses the [Plaintiffs'] breach-of-contract
10 claim"); *Hylkema v. Assoc. Credit Svc., Inc.*, 2012 WL 13681, *9 (W.D.Wash.) ("Plaintiff
11 does not respond to this argument or otherwise address his CPA claim in his opposition and
12 cross-motion. Plaintiff's failure to respond is considered a concession that defendants' argument
13 has merit. ... Plaintiff's CPA claim is, accordingly, subject to dismissal on summary judgment.");
14 *Castello v. City of Seattle*, 2011 WL 6000781, *8 (W.D.Wash.).

15 Here, Plaintiff submitted an opposition to NWTS' joinder and supplement of Defendant
16 Chase's Motion to Dismiss. *See* Dkt. 59. However, Plaintiff fails to offer any controverting
17 argument in regard to her claims against NWTS under the Fair Debt Collection Practices Act
18 ("FDCPA") or purported DTA violations stemming from the Notice of Default, Notice of Sale,
19 or Trustee's Deed. *See Id.* And, while Plaintiff's opposition refers to the Appointment of
20 Successor Trustee, Beneficiary Declaration, and Trustee's Deed, notably nowhere in Plaintiff's
21 opposition (or accompanying affidavit) has Plaintiff been able to articulate any wrongful act by
22 NWTS or any prejudice suffered based on the conduct of NWTS. *See Tuttle v. Bank of New York*
23 *Mellon*, C11-1048-RSM, 2012 WL 726969 (W.D. Wash. Mar. 6, 2012); *see also Gurtler v. Nw.*
24 *Tr. Services Inc.*, 11-CV-5745 RBL, 2012 WL 934206 (W.D. Wash. Mar. 20, 2012) (dismissing
25 borrower Plaintiff's post-foreclosure sale claim for violation of the DTA where Plaintiff alleged
26 "technical violations of the Act" and failed to allege the trustee has failed to "materially comply
with the Deed of Trust Act."); *see also In re Reinke*, BR 09-19609, 2011 WL 5079561, *9, FN9

1 (Bankr. W.D. Wash. Oct. 26, 2011) (citing *Steward v. Good*, 51 Wn. App. 509, 754 P.2d 150
 2 (Wash.Ct.App.1988); and *Koegel v. Prudential Mutual Savings Bank*, 51 Wn. App. 108, 752
 3 P.2d 385 (Wash.Ct.App.1988); *Washington Mutual v. Fritz (In re Fritz)*, 225 B.R. 218
 4 (E.D.Wash.1997) (holding where the trustee's sale has already occurred, the plaintiff must prove
 5 any purported noncompliance of the DTA by the trustee was prejudicial)..

6 **3. Plaintiff's Opposition still fails to state any claim against NWTS.**

7 a. Allegations regarding the Note Endorsements do not allege facts that amount to a
 8 claim against NWTS.

9 Plaintiff devotes most of her Opposition to hypothesizing possible reasons why
 10 Defendant Chase has not endorsed the Note. *See* Dkt. 59, at *4-13. However, as discussed in
 11 Defendant Chase's Motion, Plaintiff concedes the Note has been endorsed in blank making it
 12 bearer paper and there is "no requirement that the holder of bearer paper restrictively endorse it
 13 on demand of the drawer." *See* Dkt. 57, at *10. Moreover, Plaintiff's discussion of Note
 14 endorsements has no bearing on the propriety of NWTS' conduct as successor trustee in light of
 15 the fact that NWTS obtained a declaration attesting to Defendant Chase's holder status and could
 16 rely on such declaration pursuant to RCW 61.24.030(7)(b). *See* Dkt.58 and Exhibit 6 attached
 17 thereto, which was incorporated by reference by Plaintiff's SAC. *See* Dkt. 55. Accordingly, the
 18 majority of Plaintiff's Opposition is wholly irrelevant to the Court's determination of whether
 19 Plaintiff has stated a claim against NWTS.

20 b. Allegations regarding the Appointment of Successor Trustee do not allege facts that
 21 amount to a claim against NWTS.

22 Plaintiff asserts the "Appointment of Successor Trustee falsely legitimized and
 23 memorialized the Defendant, JPM's status as WAMU's successor – the beneficiary on the
 24 Plaintiff's note and deed." Dkt. 59, at *8.

25 As discussed in Defendant Chase's Motion, Chase's status as beneficiary and authority to
 26 enforce the Note and Deed of Trust arose via its purchase of the endorsed in blank Note, not
 pursuant to the Appointment of Successor Trustee. Dkt. 57, *3. And, as beneficiary, Chase was

1 authorized to appoint NWTS as successor trustee, which it did by recording the Appointment.

2 The only purpose of the Appointment was to designate NWTS as successor trustee.

3 Plaintiff also asserts that the recordation of the appointment of successor trustee
4 established a lien and lien priority in accordance with RCW 65.04.030 and RCW 65.08.070. Dkt.
5 59, at *8. It appears Plaintiff has misapplied both statutes.

6 RCW 65.08.030. provides that

7 “An instrument in writing purporting to convey or encumber real estate or any
8 interest therein, which has been recorded in the auditor's office of the county
9 in which the real estate is situated, although the instrument may not have been
10 executed and acknowledged in accordance with the law in force at the time of
11 its execution, shall impart the same notice to third persons, from the date of
12 recording, as if the instrument had been executed, acknowledged, and
13 recorded, in accordance with the laws regulating the execution,
14 acknowledgment, and recording of the instrument then in force.”

15 RCW 65.08.030.

16 And, 65.080.070 provides:

17 “A conveyance of real property, when acknowledged by the person executing
18 the same (the acknowledgment being certified as required by law), may be
19 recorded in the office of the recording officer of the county where the property
20 is situated. Every such conveyance not so recorded is void as against any
21 subsequent purchaser or mortgagee in good faith and for a valuable
22 consideration from the same vendor, his or her heirs or devisees, of the same
23 real property or any portion thereof whose conveyance is first duly recorded.
24 An instrument is deemed recorded the minute it is filed for record.”

25 RCW 65.08.070.

26 Both of these provisions deal with a conveyance of land. An appointment of successor
trustee, however, simply substitutes in a new trustee under the security instrument. No land is
conveyed through an appointment of successor trustee. Thus, to the extent Plaintiff bases any of
her claims on the incorrect application of RCW 65.08.070 and 030, they fail.

27 Plaintiff also claims she did not receive notice of the appointment. Dkt. 59, at *8.
28 However, no provision under the Deed of Trust Act requires that the borrower receive notice of
29 an appointment of successor trustee. *But see* RCW 61.24.010 (A resigning trustee “shall give
30 prompt notice of its resignation to the beneficiary.”) Moreover, Plaintiff has failed to identify any
31 provision of the Deed of Trust that entitles her to such notice or places the burden of providing

such notice on the successor trustee. Thus, nothing about such an allegation states a claim as to NWTS.

c. Plaintiff's Allegations relating to the Beneficiary Declaration do not allege facts that amount to a claim against NWTS.

Plaintiff alleges the subject Beneficiary Declaration failed to meet the standards set by RCW 61.24.005(2) because the declaration stated: “JPMorgan Chase Bank, N.A. successor in interest to Washington Mutual Bank fka Washington Mutual Bank, F.A. is the actual holder of the promissory note or other obligation evidencing the above-referenced loan or has requisite authority under RCW 62A.3-301 to enforce said obligation.” *See* Plaintiff’s Opposition, at *5-6.

Under RCW 61.24.030(7)(a), prior to recording a notice of trustee's sale on residential real property, the trustee shall have proof that the beneficiary is the owner of any promissory note or other obligation secured by the deed of trust. "A declaration by the beneficiary made under the penalty of perjury stating that the beneficiary is the actual holder of the promissory note or other obligation secured by the deed of trust shall be sufficient proof as required under this subsection." RCW 61.24.030(7)(a).

On its face, the subject Beneficiary Declaration meets the requirements of RCW 61.24.030(7)(a). RCW 61.24.030(7)(b) provides that unless the trustee has violated his or her duty under RCW 61.24.010(4), the trustee is entitled to rely on the beneficiary's declaration as evidence of proof required under this subsection. Here, Plaintiff does not allege NWTS violated its duty of good faith under RCW 61.24.010(4). Accordingly, the fact that the declaration added some additional language does not invalidate NWTS' ability to rely on the declaration as it did in this case.

Moreover, Plaintiff cites to *Pavino v. Bank of Am.*, N.A., C10-1943 RSL, 2011 WL 834146 (W.D. Wash. Mar. 4, 2011) in support of her assertion that the Beneficiary Declaration is insufficient under RCW 61.24.005(2). In *Pavino*, Judge Lasnik noted “The Court is unaware of any legal authority holding that a ‘person entitled to enforce’ an instrument within the meaning

of RCW 62A.3-301 qualified as a ‘beneficiary’ within the meaning of RCW 61.24.005(2).”
Pavino, at *4. However, a host of other judges in the Western District of Washington have relied
on beneficiary declarations that include the exact same language as the subject Beneficiary
Declaration in determining the foreclosure trustee satisfied its duty to obtain the requisite proof
as required by RCW 61.24.030(7)(a). See *Spenser v. Deutsche Bank*, C11-5599BHS, 2011 WL
4574894 (W.D. Wash. Sept. 30, 2011); see also *St. John v. Nw. Tr. Services, Inc.*, C11-
5382BHS, 2011 WL 4543658 (W.D. Wash. Sept. 29, 2011). Indeed, given that the Beneficiary
Declaration is not for the benefit of the borrower, the Plaintiff borrower’s allegations that the
declaration fails to meet the standard under RCW 61.24.005(2) should not be the basis of a claim
against NWTS, particularly where the evidence demonstrates that Defendant Chase was, in fact,
the beneficiary entitled to enforce the Note and Deed of Trust. See *Oliveros v. Deutsche Bank
Nat. Trust Co., N.A.*, 3:11-CV-05581-RBL, 2012 WL 113493 (W.D. Wash. Jan. 13, 2012)
 (“Indeed, the Washington Deed of Trust Act requires that a foreclosing lender demonstrate its
ownership of the underlying note to the Trustee, not the borrower [under] RCW 61.24.030(7).”).

Finally, even if Plaintiff's allegations that the beneficiary declaration did not meet the technical requirement of RCW 61.24.030(7)(a), Plaintiff has not alleged any prejudice as a result. *See Tuttle v. Bank of New York Mellon*, C11-1048-RSM, 2012 WL 726969 (W.D. Wash. Mar. 6, 2012); *see also Gurtler v. Nw. Tr. Services Inc.*, 11-CV-5745 RBL, 2012 WL 934206 (W.D. Wash. Mar. 20, 2012) (dismissing borrower Plaintiff's post-foreclosure sale claim for violation of the DTA where Plaintiff alleged "technical violations of the Act" and failed to allege the trustee has failed to "materially comply with the Deed of Trust Act."); *see also In re Reinke*, BR 09-19609, 2011 WL 5079561, *9, FN9 (Bankr. W.D. Wash. Oct. 26, 2011) (citing *Steward v. Good*, 51 Wn. App. 509, 754 P.2d 150 (Wash.Ct.App.1988); and *Koegel v. Prudential Mutual Savings Bank*, 51 Wn. App. 108, 752 P.2d 385 (Wash.Ct.App.1988); *Washington Mutual v. Fritz (In re Fritz)*, 225 B.R. 218 (E.D.Wash.1997) (holding where the trustee's sale has already occurred, the plaintiff must prove any purported noncompliance of the DTA by the trustee was prejudicial). Accordingly, Plaintiff has failed to state a claim upon which relief can be granted.

IV. CONCLUSION

Defendant Northwest Trustee respectfully requests the Court consider the foregoing in further support of its joinder in Defendant Chase's Motion to Dismiss such that Plaintiff's claims as to NWTS are dismissed, in entirety, and with prejudice.

DATED this 10th day of October, 2012.

ROUTH CRABTREE OLSEN, P.S.

/s/ Heidi E. Buck
Heidi E. Buck, WSBA #41769
Attorneys for Defendant Northwest
Trustee Services, Inc.

Declaration of Service

The undersigned makes the following declaration:

1. I am now, and at all times herein mentioned was a resident of the State of Washington, over the age of eighteen years and not a party to this action, and I am competent to be a witness herein.

2. That on October 10, 2012, I caused a copy of Defendant Northwest Trustee Services, Inc.'s Reply to Plaintiff's Response in Opposition to Motion to Dismiss Second Amended Complaint and Joinder Therein to be served to the following in the manner noted below:

<p>Deborah R. Beaton 31431 46th Pl. SW Federal Way, WA 98203</p> <p><i>Pro Se Plaintiff</i></p>	<p><input checked="" type="checkbox"/> US Mail, Postage Prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile</p>
<p>David A. Weibel Barbara L. Bollero Bishop, White, Marshall & Weibel, P.S. 720 Olive Way, Suite 1201 Seattle, WA 98101-1801</p> <p>Attorneys for Defendant JPMorgan Chase Bank, N.A.</p>	<p><input checked="" type="checkbox"/> US Mail, Postage Prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile</p>

I declare under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

Signed this 10th day of October, 2012.

/s/ Kristine Stephan
Kristine Stephan, Paralegal